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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 201.

FREDERICK N. PAULY,
RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, PLAINTIFF IN ERROR,

v.

STATE LOAN AND TRUST COMPANY,
DEFENDANT IN ERROR.

BRIEF FOR ESSEX SAVINGS BANK.

Defendant in case No. 366.

FILED BY LEAVE OF COURT.

GEORGE O. SHATTUCK,
WM A. MUNROE,
of Counsel.

Supreme Court of the United States.

No. 201.

FREDERICK N. PAULY, *Receiver, Plaintiff in Error,*

v.

STATE LOAN AND TRUST COMPANY, *Defendant in Error.*

BRIEF FOR ESSEX SAVINGS BANK.

Defendant in case No. 366.

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STATEMENT OF FACTS.

This is an action by the receiver of the California National Bank of San Diego against the State Loan and Trust Company, a corporation under the laws of California, to recover an assessment on certain shares of said California National Bank. The suit was originally brought in the Circuit Court of the United States for the Southern District of California, in which court judgment was rendered for the defendant (reported 56 Federal Reporter, 430), which judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit (reported 58 Federal Reporter, 666).

On or about the twenty-fourth day of January, 1891, one Havermale and one Collins were indebted to the defendant upon their promissory note for $12,500. On said date said Havermale and said Collins each held and owned a certificate for one hundred shares of the capital stock of said California National Bank. On said date each indorsed his said certificate in blank, and transferred and delivered it to the defend-

ant as collateral security for the payment of said note. The defendant immediately, in course of mail, surrendered said certificates to said California National Bank, and received in lieu thereof new certificates each for one hundred shares, which on their face were issued to the "State Loan and Trust Company of Los Angeles, as pledgee." Upon the issue of said new certificates the old certificates were cancelled. The defendant, the said State Loan and Trust Company, has ever since held said new certificates "as pledgee" as collateral security for the payment of said note, which has never been fully paid. Except these certificates held "as pledgee" as collateral security as aforesaid, the defendant has never held or owned stock or certificates of stock of said California National Bank. The defendant's name was never entered upon and never appeared on the stock books or other corporate books of said California National Bank except "as pledgee" of the aforesaid shares, and as to said shares the entries on the stock books and other corporate books of said California National Bank showed that the said certificates for said shares were issued to the defendant "as pledgee," and not otherwise. The defendant never received dividends on said shares, and said Havermale and said Collins after said transfer did receive dividends on said shares.

After said transfer said California National Bank became insolvent, and on the 18th of December, 1891, the Comptroller of the Currency appointed the plaintiff receiver thereof. Said comptroller, on the 5th of May, 1892, assessed the shareholders of said bank, and on the 15th of May, 1892, the plaintiff demanded the amount of the assessment on the shares held by the defendant "as pledgee" as aforesaid, claiming that the defendant was liable as a shareholder. The defendant refused to pay said assessment on the ground that it was not a stockholder and was not liable as a stockholder.

The Circuit Court gave judgment for the defendant on the

ground that the defendant was not in fact the owner of the stock, and, as the stock register showed that it held the same merely as pledgee, there was no estoppel.

This judgment was affirmed in the Circuit Court of Appeals, and the case is before this court on writ of error to the Circuit Court of Appeals.

First Point.

The only question in this case is, whether the State Loan and Trust Company was, within the meaning of Sect. 5151 of the Revised Statutes of the United States, a shareholder in the California National Bank. On and before the twenty-fourth day of January, 1891, the stock on which the defendant was charged with liability was owned by S. G. Havermale and J. W. Collins. On that day they were indebted to the defendant upon their promissory note for $12,500, and for the purpose of securing the defendant, transferred to it as collateral 200 shares in the California National Bank. On the same day certificates for the stock were issued to the defendant bank, in each of which it was stated that it was held by the defendant "as piedgee". These documents showed clearly that the purpose was, not to transfer the absolute title in the stock to the defendant, but to transfer a special or qualified property or lien, with a limited right to dispose of it only in case of default on the part of Havermale and Collins in the payment of the debt. Havermale and Collins remained the general owners, and appeared as such on the books of the bank. They collected the dividends. All these relations between Havermale and Collins and the defendant were clearly shown on the books of the California National Bank, and the bank was bound to recognize them. If it had permitted the State Loan and Trust Company to make an absolute transfer of this stock, there having been no default

on the part of Havermale and Collins, the California National Bank would have been liable for permitting it.

1 Cook on Stockholder and Corporation Law, Sect. 327.

Loring *v.* Salisbury Mills, 125 Mass. 138.

Shaw *v.* Spencer, 100 Mass. 282.

St. Romis *v.* Cotton Press Co., 127 U. S. 620.

Lowry *v.* Commercial and Farmers' Bank, Taney, 310.

In the law dictionaries and reports the pledgeor is called the owner, while the interest of the pledgee is described as a special property. In Bouvier's law dictionary, under the word "pledgee," Vol. 2, page 424, it is said, "The bailee having a special property, recovers only the value of his special property as against the owner, but the value of the whole property as against a stranger, and the balance beyond the special property, he holds for the owner."

In Welles *v.* Larrabee, 36 Fed. Rep. 866, 869, 870, the Court said, "The true ground of liability, where it exists, is not because the pledgee is owner in fact of the stock, *for he is not*, but the fact that the pledgee has received a transfer of the stock in such form that the legal ownership appears to be in him; and by thus holding himself out as apparent owner, he is estopped from showing the contrary."

It is plain, therefore, that as between Havermale and Collins and the State Loan and Trust Company, the former were the general owners, and the latter had only a special property and a limited control of it for the purposes of security. Is it possible that if this claim had been made on Havermale and Collins, they could have defended themselves by showing that while remaining the general owners of the stock, they had given a special property in it to the defendant bank? We say, therefore, it is clear upon principle that the State

Loan and Trust Company was not a shareholder within the meaning of Sect. 5151 of the General Statutes of the United States.

Second Point.

This view is sustained by the language of Sects. 5151 and 5152, which show clearly that the intention was to charge only the holder of the beneficial interest in stock with liability. In Sect. 5151 the liability is described as in addition to the amount *invested* in the stock. In no proper sense is a pledgee an investor in the stock.

Beal *v.* Essex Savings Bank, 67 Fed. Rep. 816, 817.

Sect. 5152 carefully exempts all executors, administrators, guardians, or trustees, although they may hold the legal title to the stock, because they have no beneficial interest in it.

Third Point.

This view is sanctioned by all the authorities which have passed on this question. The rule and the reason for it are well stated in Welles *v.* Larrabee, 36 Fed. Rep. 868, by Shiras, J. He said: "In enforcing the liability, the first principle which is recognized is that the actual owner of the stock may be held liable for the assessment upon the shares owned at the time of the failure of the corporation. This is upon the principle that the parties who, by reason of being the actual owners of the stock, are entitled to the profits and benefits of the business carried on by the corporation must respond to the burdens and debts up to the statutory limit. In the enforcement of this liability against stockholders, it is well established that the actual owners of the corporate stock cannot shield themselves against such liability

by putting the title of the stock in the name of some irresponsible third party."

Thompson on the Liability of Stockholders, Sect. 223.
1878, National Bank *v.* Case, 99 U. S. 628, 631.

This rule has been applied in several cases in which it has been held that a pledgee of stock is not liable unless he has appeared as absolute owner on the books of the company, and has thereby become liable by estoppel.

1883, Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 478, 483.
1888, Welles *v.* Larrabee, 36 Fed. Rep. 866.
1893, Pauly *v.* State Loan and Trust Co., 56 Fed. Rep. 431.
1893, Same Case in Circuit Court of Appeals, 58 Fed. Rep. 666.
Beal *v.* Essex Savings Bank, 67 Fed. Rep. 816.

In these decisions the question is presented in different aspects.

In Anderson *v.* Philadelphia Warehouse Co., the stock was registered in the name of an irresponsible third party, so that the defendant might have control of the stock for the purposes of security without making itself liable as a registered shareholder. The Court held that this could be safely done, and that the defendants were not liable. Waite, Ch. J., said, "It has never to our knowledge been held that a mere pledgee of stock is chargeable where he is not registered as owner." It is well settled that if, in that case, the defendant had been the beneficial owner of the stock instead of a pledgee, and had caused it to be registered in the name of an irresponsible party, it would have been liable.

1879, Davis *v.* Stevens, 17 Blatch. 259.

National Bank *v.* Case, 99 U. S. 628.
Bowden *v.* Johnson, 107 U. S. 251.

The case of Anderson *v.* Philadelphia Warehouse Co. is therefore directly to the point that a pledgee is not liable unless he has held himself out as owner by registering the stock in his name.

In Welles *v.* Larrabee *et al.*, one of the defendants, the First National Bank of McGregor, had made a loan upon a pledge of the stock of the Commonwealth National Bank of Dubuque, and had caused it to be registered upon the books of the bank in the name of the defendant Larrabee as trustee, and a certificate of stock was issued to him "as trustee." It was held upon the authority of Anderson *v.* Philadelphia Warehouse Company, 111 U. S. 479, that the real pledgee was not liable because "its only interest therein was by way of security for a debt due from the actual owner," and that it had not registered as owner, and that Larrabee was not liable because (1) the insertion of the word trustee after his name upon the certificate put the parties upon inquiry as to his relation to the property, and it appeared on inquiry that he was never the real owner; and (2) because he came under the provisions of Sect. 5152, which exempts trustees from liability.

In Beal *v.* Essex Savings Bank, 67 Fed. Rep. 816, the defendant had taken stock in the insolvent bank as collateral security for a loan, and had the stock transferred to it as collateral security, and took out a certificate of stock in its own name "as collateral" These words are like the words "as pledgee" in the case at bar. The Circuit Court of Appeals, in the opinion in that case, said (on page 818), "In the present case nothing has been done by the Essex Savings Bank, or by its consent, by which it was held out to be other than a mere creditor holding the stock as col-

lateral, or by which it is in any way estopped. As between itself and its debtors Potter and French, it clearly was not a shareholder, and it has done nothing to hold itself out to others as such."

The Circuit Court of Appeals said of the record in this case that "any and every person dealing with the bank is thereby apprised that the pledgee only holds the stock as security for some debt or obligation, and that the real owner of it is the pledgeor, to whom he must look for the statutory liability.

Pauly *v.* State Loan and Trust Company, 56 Fed. Rep. 430, 434.

In the case at bar, it was held both in the Circuit Court and in the Circuit Court of Appeals that the pledgee was not liable, on the authority of Anderson *v.* Philadelphia Warehouse Company, 111 U. S. 479, 483.

These decisions cover this case. A holder of collateral security, with no power to make his title absolute by a foreclosure of the right of redemption, is a pledgee and not a mortgagee.

1865, Newton *v.* Fay, 10 Allen, 505, 507.

In the case at bar, the words "as pledgee" appearing in the certificate, the transfer and the accounts on the stock books and other corporate books declared in terms that the State Loan and Trust Company did not hold the general title, but a mere right to security, and that it was not the "real" or "beneficial" owner. "Even where in lieu of delivery an apparent transfer of title is made for the purpose merely of security, the general property remains in the pledgeors."

Pauly *v.* State Loan and Trust Company, 58 Fed. Rep. 666, 668.

In this case, the instrument of transfer, the certificate and all the entries limited the title of the State Loan and Trust Company to the rights of a security holder or pledgee. "Where the thing pledged is a chose in action, the term 'collateral security' is now most commonly applied to the transaction; but this change of name has worked no change in the law."

Mitchell *v.* Roberts, 17 Fed. Rep. 778.

Fourth Point.

In answer to this view of the case, the receiver relies, first, upon the provisions of Sect. 5139 of the Revised Statutes, and the By-Laws of the company.

The Statute provides that stock "shall be transferable on the books of the association in such manner as may be prescribed in the By-Laws or Articles of Association." It also provides that "every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares."

The difficulty with the receiver's view is, that this was not, in form or substance, an absolute transfer of the title to the stock. The State Loan and Trust Company did not succeed to all the rights of the prior holder of such shares. On the contrary, the transfer in form, and the certificate which was issued upon it, distinctly limited the right of the State Loan and Trust Company, giving them only a special property in the shares. We have shown by the authorities that the corporation was bound to recognize this limitation in the interest of the defendant bank; and, therefore, the provisions in the By-Laws are not applicable to this case.

Besides, it is well settled that these Statute provisions and By-Laws do not control the passing of title to stock by transfer of a certificate, and that they are solely for the pro-

tection and convenience of the banks may be waived by it. By inserting the words "as pledgee" in the certificate, it waived any right to consider the defendant the general owner.

Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369.

Johnston *v.* Laflin, 103 U. S. 800, 804.

1 Cook on Stock and Stockholders, Sect. 383.

Fifth Point.

The receiver also relies on cases decided under and prior to the passage of the Act in question, in which, under certain circumstances, it has been held that pledgees are chargeable with this liability. We have carefully examined all of these cases, and assert with confidence that there is not one of them in which a pledgee has been charged with liability, in which he did not appear as the absolute owner on the books of the bank, and was therefore held out as an owner and is estopped as against creditors to deny his ownership.

The cases cited by the receiver, which were decided under Acts in some respects similar to this, are:

Crease *v.* Babcock, 10 Met. 425.

Price & Brown's Case, 3 De G. & Sm. 146.

Newry Ry. Co. *v.* Moss, 14 Beav. 64.

Hoare's Case, 2 Johns. & H. 229.

And in New York:

Adderly *v.* Storm, 6 Hill, 624.

In re Empire State Bank, 18 N. Y. at page 223.

Rosevelt *v.* Brown, 11 N. Y. 148.

Also,

Aultman's Appeal, 98 Pa. St. 505.

Henkle *v.* Salem Mfg. Co., 39 Ohio Street, 547.

Sleeper *v.* Goodwin, 67 Wis. 577.

In all the above cases, the party charged appears as absolute owner on the books, except in Hoare's Case, 2 Johns. & H. 229, where the defendant was described as a trustee, but clearly held the legal title; and the Act under which that was decided did not exempt trustees.

The same is true of the cases cited by the defendant which have been under the Act in question, and similar acts since the passage of this Act:

National Bank *v.* Case, 99 U. S. 628.
Anderson *v.* Phila. Warehouse Co., 111 U. S. 479.
Magruder *v.* Colston, 44 Md. 349.
Moore *v.* Jones, 3 Woods, 53.
Wheelock *v.* Kost, 77 Ill. 296.
Hale *v.* Walker, 31 Iowa, 344.
Adderly *v.* Storm, 6 Hill, 624.
In re Empire City Bank, 18 N. Y. 199, 223, 224.
Rosevelt *v.* Brown, 11 N. Y. 148.

In all these cases the stock was transferred to the pledgee as absolute owner, and he appeared as absolute owner on the books. And in every case the court rely upon the fact that the party appeared as an absolute owner, as a ground for charging him with liability.

The reasons given by the courts show clearly that the pledgee was charged, not because he was a pledgee, but because he held himself out as an absolute owner.

In Anderson *v.* Philadelphia Warehouse Company, *ubi supra*, Waite, Ch. J., said, "It has never to our knowledge been held that a mere pledgee of stock is chargeable where he is not registered as owner."

In Welles *v.* Larrabee, 36 Fed. Rep. 866, 869–70, the Court said: "The true ground of liability where it exists is not because the pledgee is the owner in fact of the stock, for he is not, but the fact that the pledgee has received a trans-

fer of the stock in such form that the legal ownership appears to be in him; and by thus holding himself out as apparent owner he is estopped from showing the contrary." This has been already cited for another purpose under the first point.

In Moore *v.* Jones, 3 Woods, 55, the Court said: "By appearing on the stock book of the bank, and upon the list of shareholders required to be posted in the business room of the bank, they assumed the liability of shareholders. Neither the bank nor the public were required to take notice of the private understanding between the pledgees and pledgeors. The individual liability falls upon the person who appears on the stock book of the bank, by transfer to him, to be the owner of the stock. The law organizing banks seems to place it there. To allow one who, by inspection of the stock book, appears to be a shareholder, who has allowed himself to be held out by the bank to the public as a shareholder, to set up secret arrangements between himself and the real owner, as a defence to his individual liability for the debts of the bank, would be to make of no avail the individual liability clause of the currency act."

In Rosevelt *v.* Brown, 11 N. Y. 148, 153, quoted with approval as follows: "They might receive dividends, vote at elections and enjoy all the other rights appertaining to the ownership of the property, and with the privilege they must take the burden of the shareholders. After the defendants had once become legal owners they could only throw off the liabilities incident to that relation by transferring the stock. Until this was done they continued to be stockholders within the meaning of the statute. If we depart from the terms of the law and inquire into the equities which may exist between the stockholders and some third person, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may be done by the corporation. If the creditors

must look beyond the legal title they never can know against whom to proceed.

"The usual way in which stock is pleged is by delivery of the certificate of the corporation by the pledgors, with a power of attorney to the pledgee to make a transfer on the books of the company. If the defendant had pursued this course he would have had no difficulty."

In Altman's Appeal, 98 Penn. St. 516, the Court said: "It is now too well settled to be any longer a question, that when stock is transferred to a man as collateral, and stands in his name, he incurs liability as a stockholder just as if he were the actual beneficial owner. 9 Otto, 628. Most especially is this just and right as to creditors who trust to his name and have no notice of the secret trust upon which the stock is held."

In our case, the books of the bank, upon which the creditors are supposed to rely, showed that Havermale and Collins were the stockholders, and that the defendants were not.

Sixth Point.

It is apparent from these and other decisions, that the courts have shown no disposition to interpret the statute technically or oppressively, or to depreciate the value of stocks of these national corporations by preventing their free use as securities, by charging persons having limited and special titles with the obligations of investors. They disregard technical consideration.

1. They seek for and charge the actual owner, although his name does not appear and may never have appeared on the books of the bank.

Davis *v.* Stevens, 17 Blatch. 259.
Borland *v.* Haven, 37 Fed. Rep. 394.

2. They also charge a pledgee who has his stock registered as if he were absolute owner, on the ground that he has held himself out as owner and is estopped to deny it.

3. Under all other circumstances a pledgee has been held to be exempt from liability.

GEO. O. SHATTUCK,
WM. A. MUNROE,

for Essex Savings Bank, filing a brief by leave of Court.

95-606

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SUPREME COURT OF THE UNITED STATES,

NUMBER TWO HUNDRED AND ONE OF
OCTOBER TERM, 1896.

FREDERICK N. PAULY,
Plaintiff-in-Error,

against

THE STATE LOAN AND TRUST COMPANY.

PETITION FOR RE-HEARING.

The Supreme Court of the United States.

NUMBER TWO HUNDRED AND ONE OF OCTOBER TERM, 1896.

FREDERICK N. PAULY,
Plaintiff in Error,

against

THE STATE LOAN AND TRUST COMPANY.

To the Honorable the Justices of the Supreme Court of the United States:

Frederick N. Pauly, the plaintiff in error, does, by the direction of the comptroller of the currency, respectfully present his petition for a rehearing, and does submit the following reasons why his prayer should be granted:

I.

The Court has said, in its opinion, this:

"That the *real* owner of the shares of the capital stock "of a national banking association may, *in every case*, "be treated as a shareholder within the meaning of sec- "tion 5151;"

Italics are mine, of course.

The words, "in every case," naturally include within their meaning the case where the real owner is NOT *on the registry.*

Of course, in this case that *must* be their meaning—Havermale and Collins, *or their unknown assignees*—must be liable, OR NOBODY IS.

It is respectfully submitted:

First.—That no one, under the national banking act or any similar statute, has ever yet been *held* liable, because he was the *real owner, unless he was on the registry.* In other words, no one has ever yet been *held* to be liable *because* he was the *real* owner.

Secondly.—That no one has ever yet been *held* to be liable—*as a shareholder*—unless he was ON THE REGISTRY.

The only sort of case where one, *not* on the registry, has ever been *held* to be liable, is the sort of case, like *Bowden* v. *Johnson*, 107 U. S., 251, where a shareholder *on the registry*, knowing that the bank was in failing circumstances, *and with a view to escape the liability*, has transferred, *on the registry*, his stock to an *irresponsible* party. In such cases the transferror has been held to be liable—not because he was the real owner, for *he was not the real owner*, he had entirely parted with his stock—but because in the parting with his stock he had committed a *fraud*, and he was held to be liable *for the fraud*.

Certain of the cases of this class, and they are numerous, *say* that the transfer in such a case is fraudulent as against creditors and *voidable* BY THEM.

Other cases say that such a transfer is *void*. Whichever way the holding be, it is plain that it cannot affect the pending question. If the transfer was void the transferror *is still on the registry*. If it be voidable and avoided he is *returned* to the registry.

Thirdly.—There are innumerable cases where the one on the registry, though *not* the real owner, has been held liable.

The records in all such cases as have been decided by the Court have been examined—there are five of them—and in none of them is there either proof or claim that the plaintiff, or any creditor, *knew of the fact of the registry and relied upon it.* These cases, therefore, cannot be sustained upon the ground of estoppel.

Of course an estoppel, *by a representation or an admission*, only exists in favor of one who has, *to his injury*, relied upon the representation *and*, of course, *knew of it*.

Anything else would exalt an admission or representation—which all the books classify as the lowest sort of evidence—into something above and beyond all evidence.

Unless the representation has been relied upon and acted upon, it simply amounts to the proof that the defendant, or somebody in his name, had made a representation which was not true—not necessarily with intention, of course.

Proof that he had said that the moon was made of green cheese, or that General Washington was a coward, would be exactly equivalent. Nobody, however, would think of seriously contending that the defendant was liable as a stockholder of the California National Bank because it had represented, no matter with what solemnity, that General Washington was a coward.

And yet that is what the argument must come to. An UNKNOWN, though false representation cannot possibly amount to anything more than proof that the defendant had at some period of his life told a lie—NO MATTER ABOUT WHAT.

Of course, if all the compt.oller of the currency has got to do, in order to enforce an individual liability of any one as a shareholder, is to prove that *at some time in his life he had told a lie* NO MATTER ABOUT WHAT, the problem of enforcing the individual liability of shareholders would be a comparatively easy one. He has simply to select as many responsible human beings—*anywhere*—as there are outstanding stock certificates of the bank. Sue them—rake up their childhood lives and prove that each of them had told a lie—*about something or other*. If he picked out the best sort of men, it would be quite sufficient to put the defendants themselves on the stand and ask each of them if he had ever told a lie. Probably he would get an affirmative answer.

All this is ridiculous of course; but, it is most respectfully submitted, that it is what the argument inevitably ends in.

Nor is there any way out of this by holding there to be a *presumption* that the creditor has examined the registry—seen the representation—and relied upon it. If this be so it necessarily follows that *the defendant can disprove it*. He can show that the creditor has *not* examined it—did *not* know of the representation, and, of course, could not have relied upon it. This would throw upon the defendant the burden of proving a negative and relieve the plaintiff from the necessity of proving his case.

Both of these things are, of course, absurd.

In not one of the five cases was the reason given for the judgment said to be an estoppel; and in *Richmond* v. *Irons*, 121 U. S., 27, the Court gave this reason:

(p. 58) "By § 5139 of the Revised Statutes, those persons *only* have the rights "and liabilities of stockholders *who appear to be such as are registered on the* "*books of the association, the stock being transferable only in that way.* No "person becomes a shareholder, subject to such liabilities and succeeding to such "rights, *except by such transfer;* until such transfer the prior holder is the stock-"holder for all the purposes of the law. It follows, therefore, that Charles Com-"stock, in respect to the shares sold by him in February and June, 1873, was the "statutory owner on the 23d day of September, 1873."

Of course the *Whitney case* (*Whitney v. Butler*, 118 U. S., 655) is conclusive against the idea of an estoppel. In that case Whitney was registered as owner, and yet he was held not to be liable, because he had given instructions that the stock should be transferred upon the registry and supposed it had been done. In fact it had not been done. He still stood upon the registry as *owner* and of course that made as complete a representation as could possibly be made. If the doctrine can be applied in any of the cases which have been adjudged by the Court, it must necessarily have been applied in that case.

If a creditor, when about to put his money in the bank, had looked at the registry he would have seen *Whitney's* name upon it, and the representation would have been as complete as it possibly can be in any case. Of course he did not look. There is no case in which it has ever been shown that any creditor had any such knowledge. But without that knowledge he cannot possibly have been misled.

And if no one has been misled, there cannot be an estoppel.

II.

There is a great variety of questions of this kind all over the country.

For instance, here is one. Two stockholders of a national bank in Texas borrowed money of the Southern National Bank in New York, made their note for it, and put up the certificates of stock as collateral. The note came due, was unpaid, and the Southern National proceeded to have the stock sold at auction on the Exchange on sufficient notice and in the regular way and all that sort of thing. It was so sold, and the bank had one of its clerks buy it. It brought twenty dollars, which the bank paid to the auctioneer by its cashier's cheque. The auctioneer, keeping out his fees, which were eight dollars, paid back to the bank the balance of twelve dollars. The bank had the certificates all the time and still has them. The makers of the note were all the time on the registry and still are so.

Of course the bank is the "*real*" owner. Is it liable?

Here is another instance: Five human beings by the name of Lombard were shareholders of the State National Bank of Wichita, Kansas. One Truman owned a mortgage upon real estate for one hundred and fifty thousand dollars. One of the Lombards made an agreement with Truman to buy the mortgage for the stock and twenty-one thousand dollars in money, using his own name alone in the transaction. Truman assigned the mortgage to this particular Lombard, received the twenty-one thousand dollars and a transfer upon the books of about half the stock—made by his direction to "Serena Truman, trustee," Serena Truman being his wife and an entirely irresponsible person. Her "*trust*" was confined to this transaction. The rest of the stock was about half-way transferred, that is to say, the cashier, who was one of the

other Lombards, signed the transfer on the books, and the president, who was *not* one of the Lombards, refused to sign it. The particular Lombard who made the agreement was the father of the other four. He is responsible. The other four are not. He had been the president of the bank until about six months before its failure. Now Truman brings an action in the proper State Court against the particular Lombard only, to set aside the agreement for false representations; he gets a judgment; tenders his twenty-one thousand dollars and a re-transfer of the stock and demands his mortgage.

Who is liable here?

The Court holds that the *real* owner is liable. The Court has some half dozen times held that the *registered* owner was liable though not the real owner. Cannot the comptroller of the currency collect twice on the same stock?

In making this petition the comptroller of the currency has not any pride of opinion. This case was brought before his time. He is simply trying, according to the best of his ability, to do a not pleasant duty. It is not pleasant to be bullied by a lot of clamoring creditors into bringing a great quantity of suits, and then, some four or five years afterwards, when the cases get to the Court, to be beaten in them.

He does most respectfully, and with *all* and the utmost deference, and—using the word of the ancient chancery pleading, and meaning it too—most *humbly* and with all *sincerity* submit to the Court that the case should be reheard, not necessarily because the ultimate judgment in the case is going to be wrong, but in order that, as far as

may be possible, the Court may define what the law upon the subject really *is*.

He is at present advised that no human intellect, not even the intellect of the great Hiawatha himself, could now, safely, ascertain that matter.

III.

Number three hundred and sixty-six of the present term will bring up—quite exactly—this same question again.

The undersigned, a member of the bar of the Court, humbly conceives that it is proper that the case should be reheard, if the Court shall see fit so to order, either by itself, or else in connection with number three hundred and sixty-six, which will bring up the same question, and he does, therefore, in obedience to rule thirty, respectfully certify accordingly.

EDWARD WINSLOW PAIGE,
Of Counsel for the Plaintiff in Error.

New York, twenty-first of March, 1897.

SUPREME COURT OF THE UNITED STATES.

No. 201.—October Term, 1896.

Frederick N. Pauly, Receiver of the California National Bank of San Diego, Plaintiff in Error, *vs.* The State Loan and Trust Company.	In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 1st, 1897.]

Mr. Justice Harlan delivered the opinion of the Court.

This was an action to recover the amount of an assessment made on the shareholders of a national banking association in the hands of a receiver.

Is the defendant in error, the State Loan and Trust Company, a "shareholder" of the California National Bank of San Diego within the meaning of the statute relating to national banking associations? That is the sole question presented by the pleadings.

By the Revised Statutes of the United States it is provided—

"§ 5139. The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be

made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

"§ 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. . ."

"§ 5152. Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such funds would be, if living and competent to act and hold the stock in his own name."

"§ 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

The Comptroller of the Currency appointed the plaintiff in error receiver of the California National Bank of San Diego, California. *R. S.* § 5234. He gave bond as required by law, and thereafter entered upon the discharge of the duties of his trust.

In virtue of the authority conferred upon him by law, the Comptroller made an assessment on the shareholders of the bank for five hundred thousand dollars, to be paid by them on or before the 18th day of June, 1892. The assessment was equally and ratably upon shareholders to the amount of one hundred per centum of the par value of the shares of the capital stock of the bank held and owned by them respectively at the time of its failure or suspension, and the receiver was required by an order of the Comptroller to institute suits to enforce against each shareholder his personal liability to that extent.

The receiver gave due notice of the assessment, in writing, to the State Loan and Trust Company—which is a corporation of California, having its principal place of business at the city of Los Angeles in that State—and made demand upon it therefor, but the company did not pay the same or any part thereof.

The facts upon which the claim against the defendant company is based are these: S. G. Havermale and J. W. Collins, owners and holders respectively of certificates numbered 286 and 297 issued to them for one hundred shares, each, of the capital stock of the California National Bank of San Diego, were indebted to the State Loan and Trust Company upon their promissory note for $12,500, besides interest. These certificates having been endorsed by the respective holders by writing their names across the back thereof, were transferred and delivered to the State Loan and Trust Company as collateral security for the payment of the above note, and, so endorsed, were, in ordinary course of mail, transmitted and surrendered to the California National Bank of San Diego. New certificates, numbered 308 and 309, respectively, were thereupon issued to the State Loan and Trust Company of Los Angeles, as "pledgee," in lieu of certificates 286 and 297.

Each of the new certificates showed upon its face that it

was issued to the "State Loan and Trust Company of Los Angeles, pledgee," and each purported to be for one hundred shares of the capital stock of the California National Bank of San Diego.

The defendant, after receiving certificates 308 and 309, held them "as pledgee, and as collateral security for the payment of said note, and for the unpaid balance of the debt thereby represented."

Otherwise than as just stated, the State Loan and Trust Company of Los Angeles never had, owned or held any shares of the capital stock of the California National Bank of San Diego, and never was entitled to hold the usual stock certificate as such shareholder to the amount of two hundred shares or to any amount.

Except as pledgee of the stock represented by certificates 308 and 309, respectively, the name of the State Loan and Trust Company never appeared upon or in the stock or other corporate books of the California National Bank of San Diego as a shareholder. The entries in the books of the bank showed that the new certificates were issued to the State Loan and Trust Company as pledgee, and not otherwise.

A jury having been waived by the parties in writing, the case was tried in the Circuit Court, and judgment was rendered for the defendant. 56 *Fed. Rep.* 430. Upon appeal to the Circuit Court of Appeals that judgment was affirmed. 15 *U. S. App.* 259.

Is one who does not appear upon the official list of the names and residences of the shareholders of a national banking association otherwise than as "pledgee" of a given number of shares of the capital stock of such association — nothing else appearing — liable as a "shareholder" of such association under section 5151 of the Revised Statutes of the United States declaring that "the shareholders of every national banking association shall

be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares?''

As both sides contend that their respective positions are in harmony with decisions heretofore rendered in this court, it will be necessary to refer to some of the cases cited by counsel.

In *Pullman* v. *Upton*, 96 U. S. 328, 330, which was an action by the assignee in bankruptcy of an insurance company to compel a holder of shares of its stock to pay the balance due thereon, the court said: ''The only question remaining is, whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company, after it has become bankrupt. That the original holders and the transferees of the stock are thus liable we held in *Upton* v. *Tribilcock*, 91 U. S. 45, *Sanger* v. *Upton*, *Id.* 56, and *Webster* v. *Upton*, *Id.* 65; and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have, if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner—that is, the one in whose name the stock stands on the books of the corporation—is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he has no beneficial interest therein.''

In *National Bank* v. *Case*, 99 U. S. 628, 631, 632—

which was an action to make the Germania National Bank of New Orleans liable as a shareholder of another national bank that had become insolvent—it appeared that Phelps, McCullough & Co. borrowed money from the defendant bank, and to secure the payment of the loan, evidenced by note, pledged one hundred shares of the stock of the Crescent City National Bank, with power on non-payment of the sum borrowed to dispose of the stock for cash without recourse to legal proceedings, and to that end to make transfers on the books of the latter corporation. The note not having been paid, the stock was transferred on the books of the Crescent City National Bank to the Germania National Bank. The latter subsequently caused the stock to be transferred, on the books of the former, to one of its clerks, who acquired no beneficial interest in it, and between whom and the officers of his bank it was understood that he would re-transfer the stock at their request. This court, observing that notwithstanding the transfer to the clerk the stock remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners, said: "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* v. *Upton*, 96 U. S. 328; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* v. *Storm*, 6 Hill (N. Y.), 624; *Roosevelt* v. *Brown*, 11 *N. Y.* 148; *Holyoke Bank* v. *Burnham*, 11 *Cush.* (*Mass.*) 183; *Magruder* v. *Colston*, 44 *Md.* 349; *Crease* v. *Babcock*, 10 *Metc.* (*Mass.*) 525; *Wheelock* v. *Kost*, 77 *Ill.* 296; *Empire City Bank*, 18 *N. Y.* 199; *Hale* v. *Walker*, 31 *Iowa*, 344. For this several reasons are given. One is, that he

is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. . . When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made." After referring to some of the English cases, the court proceeds: "The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect of such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferrer and the transferee it was out and out.' *Nathan* v. *Whitlock*, 9 *Paige*, (*N. Y.*) 152; *McClaren* v. *Franciscus*, 43 *Mo.* 452; *Marcy* v. *Clark*, 17 *Mass.* 329; *Johnson* v. *Laflin*, *by Dillon*, *J.*, 6 *Cent. Law Jour.* 131, [5 Dillon, 65.] The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferrer. Waldo was bound to re-

transfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferrer from his liability as a stockholder."

It may be here observed that in *Pullman* v. *Upton* the person who sought to escape liability as a shareholder appeared on the books of the insolvent insurance company *as the owner* of the stock; and that in *National Bank* v. *Case* the Germania National Bank, after the original transfer under the power of attorney executed by its debtor, appeared on the books of the other bank *as the owner* of the stock, and that the liability arising therefrom could not be defeated or avoided by a transfer, however regular in form, to another who acquired no beneficial interest in it, and was to hold the stock simply for its benefit. Nothing appeared upon the stock list, in either case, to indicate that the person or corporation who appeared on such list as a shareholder was not, in fact, the actual holder.

In *Bowden* v. *Johnson*, 107 *U. S.* 251, 261, which involved the liability as a shareholder of a national bank of one who became the purchaser and owner of some of its shares, and who, in apprehension of the bank's failure, and in order to escape liability, transferred his stock to an irresponsible person, the court said: "The answer sets forth that Johnson became the purchaser and owner of the one hundred and thirty shares in 1869. As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock. But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an

irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any liability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder *quoad* the creditors, although he may be able to show that there was a full or partial consideration for the transfer, as between him and the transferee. The appellees contend that the statute does not admit of such a rule, because it declares that every person becoming a shareholder by transfer succeeds to all the liabilities of the prior holder, and that, therefore, the liabilities of the prior holder, as a stockholder, are extinguished by the transfer. But it was held by this Court in *National Bank* v. *Case*, 99 *U. S.*, 628, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The Court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors."

But the case to which our attention has been particularly called is *Anderson* v. *Philadelphia Warehouse Company*, 111 *U. S.*, 479, 483–5, in which the question was as to the liability of the Philadelphia Warehouse Company as a shareholder of a national bank that had become insolvent. The facts in that case were these: Blumer & Co. (the senior member of that firm being president of the bank) arranged with the Warehouse Company for a loan or banker's credit, to be secured by collaterals. Kern, a

member of the firm, transferred 450 shares of the stock of the bank, standing in his name on the books of the bank, and caused a new certificate to be issued in the name of Henry, as president of the Warehouse Company, and it was taken or sent to that company as further security for the credit extended to Blumer & Co. The fact of this transfer of stock to the name of Henry, as president, having come to the knowledge of the directors and executive committee of the Warehouse Company, they caused a transfer to be made on the books of the bank to one McCloskey, an irresponsible person and a porter in its employment, and a new certificate to be issued in his name, because they deemed it inadvisable to have the stock stand in the name of the company's president, and thus incur the liability imposed upon shareholders of national banks. McCloskey never had possession of the certificate, and gave to the Warehouse Company an irrevocable power of attorney for the sale and transfer of the stock. Upon McCloskey's death the stock was transferred on the books of the bank to Ferris, also an irresponsible person and an employé of the Warehouse Company. A new certificate was issued to him, and delivered to the company, Ferris endorsing thereon an irrevocable power of attorney for its transfer. When the bank failed, the stock stood in the name of Ferris, the Warehouse Company holding the certificate. The company never received any dividends on the stock, and never acted as a shareholder, but held the stock as security for the debt due it.

This court in that case recognized it to be well settled that one who allows himself to appear on the books of a national bank as an "owner" of its stock is liable to creditors as a shareholder, whether he be, in fact, the absolute owner or only a pledgee, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escap-

ing liability, or if his transfer is colorable only, the transaction is void as to creditors—citing *National Bank* v. *Case*, 99 *U. S.* 628; *Bowden* v. *Johnson*, 107 *U. S.* 251. It was further said to be beyond question that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder; "but," the court observed, "it has never to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered *as owner*."

It appeared, according to the opinion in that case, that there was no evidence of actual fraud or bad faith; that the Warehouse Company never was the owner of the stock in question, and never held itself out as such; that the transfer of Kern and Blumer & Co. was only by way of pledge, and the company was bound to return the stock whenever the debt, for which it was held, was paid; that the company never consented to a transfer of the stock to its name on the books, or to that of its president, and that for seven years before the failure of the bank, and at least five years before its embarrassments were known to the company or the public, the stock with the assent of Kern, Blumer & Co. and the officers of the bank, stood in the name of McCloskey or Ferris; that during all that time neither the registered holders nor the Warehouse Company claimed dividends or in any way acted as shareholders; that either Kern or Blumer & Co. took the dividends as they were paid, and to all intents and purposes controlled the stock; that there was no concealment on the part of the Warehouse Company, and no effort to deceive; that it had possession of the certificates representing the stock, with full power to control them for all the purposes of its security, but never was or pretended to be anything else than a mere pledgee; that those who examined the list of shareholders would have found the name

of McCloskey or of Ferris as the registered holder of four hundred and fifty shares; there was nothing on the books of the bank to connect them, or either of them, with the Warehouse Company, and, therefore, no credit could have been given on account of the apparent liability of the company as a shareholder.

"If," the court said, "inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. Blumer & Co. and the bank were fully advised who McCloskey was, and of his probable responsibility, when they allowed the transfer to be made to him, and they undoubtedly knew who Ferris was when the stock was put in his name after McCloskey's death. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security as pledgee, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee, without making itself liable as an apparent owner. Kern or Blumer & Co. still remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt. They consented to the transfer, not to escape liability as shareholders, but to save the company from a liability it was unwilling to assume, and at the same time to perfect the security it required for the credit to be given. As between Blumer & Co. and the Warehouse Company, Blumer & Co. or Kern were the owners of the stock and the company the pledgee. As between the company and the bank, or its creditors, the company was a pledgee of the stock and liable only as such. The

creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern or Blumer & Co., who were always the real owners. To our minds the fact that the stock stood registered in the name of Henry, President, from December 27th to January 10th, is, under the circumstances of this case, of no importance. The Warehouse Company promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose. It asked that the transfer might be made to McCloskey. To this the owners of the stock and the bank assented, and from that time the case stood precisely as it would if the transfer had originally been made to McCloskey instead of Henry, President, or if Henry had retransferred to Kern or Blumer & Co., and they had at the request of the company made another transfer to McCloskey. The security of the Warehouse Company was perfected without imposing on the company a shareholder's liability. All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment. So far as the company was concerned, the transfer was not made to escape an impending calamity, but to avoid incurring a liability it was unwilling to assume, and which it was at perfect liberty to shun."

Another of the cases referred to, although it did not relate to the liability of the shareholders of national banking associations, is *Easton* v. *German-American Bank*, 127 *U. S.* 532, 536–7, in which it was said: "Where personal property is pledged, the pledgee acquires the legal title and the possession. In some cases, it is true, it may remain in the apparent possession of the pledgor, but, if so, it can be only where the pledgor holds as agent of the pledgee. By virtue of the pledge, the pledgee has the right by law, on default of the pledgor, to sell the prop-

erty pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he cannot also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale. The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as security for the payment of an obligation, with a power to sell in case of default. There the creditor is also a trustee to sell, and cannot purchase the property at his own sale for his own use."

It is apparent that the precise question before us was not involved in any of the above cases, although the principles announced in them bear upon the issue here presented.

From those cases the following rules relating to the liability of shareholders of national banking associations may be deduced:

That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151;

That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way as to imply that the pledgee is the real owner, then the pledgee may be treated as a shareholder within the meaning of section 5151 of the Revised Statutes of the United States, and therefore liable upon the basis prescribed by that section for the contracts, debts and engagements of the association;

That if the real owner of the shares transfers them to

another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by section 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed;

That if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor—the latter acting in good faith and for the purpose only of securing the payment of that debt, without incurring the responsibility of a shareholder—he, the creditor, will not, although the real owner may, be treated as a shareholder within the meaning of section 5151; and,

That the pledgee of personal property occupies towards the pledgor somewhat of a fiduciary relation, by virtue of which, he being a trustee to sell, it becomes his duty to exercise his right of sale for the benefit of the pledgor.

The present case differs from those cited in the important particular that the stock list of the bank gave information to all who examined it that the State Loan and Trust Company was not the real or absolute owner of the shares in question, but held them only as "pledgee;" that there was no "out and out" transfer of the stock, whereby the transferrer, as between him and the transferee, parted with his interest; and that the real ownership remained with the pledgor, the pledgee acquiring only a lien upon the stock to secure its debt.

In the case of *Finn* v. *Brown*, 142 *U. S.* 56, 71, the

question was as to the liability as a shareholder of a director of a bank who appeared upon its books to be the owner of a given number of shares of stock. The Court said: "It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock book. The jury would not have been justified in holding the defendant not liable for the assessment on the 50 shares or for the $1,750 dividend. The dividend was undoubtedly fraudulent, and the records of the bank were falsified in showing that the defendant was present at the meeting at which the dividend was declared. It was declared, probably, by De Walt himself alone, for the purpose of showing a fictitious prosperity and of concealing from the public and the directors the real condition of the affairs of the bank. The defendant had had no previous connection with a banking business, and was deceived by De Walt. But all this cannot relieve him from liability. The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds; and it cannot be held, with any safety to the interests of the public and those who deal with national banks, that a director, who also is vice-president and acts as cashier, can shield himself from liability by alleging ignorance of what appears by the books of which he has charge."

Does the statute, in letter or spirit, require that the word "pledgee," appended to the name of the party to whom certificates 308 and 309 were issued, should be entirely ignored? Is the holder of such certificates in no better condition, in respect of liability as a shareholder, than if such list had imported absolute ownership in the

transferee? The statute requires that there shall be kept, at all times, in the office where the business of a national banking association is transacted, and subject, during business hours, to the inspection of shareholders and creditors of the association, as well as of officers authorized to assess taxes under State authority, a full and correct list of the names and residences of all the shareholders of the association, and of the number of shares held by each. § 5210. Manifestly, one, if not the principal, object of this requirement, was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements. Referring to this provision this court said, in *Waite* v. *Dowley*, 94 *U. S.* 527, 534, that the act of Congress "was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank." And, let it be observed, the liability upon shareholders is to the extent of the amount of their stock at the par value thereof, "in addition to the amount *invested in* such shares." The word "invested" plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and cannot refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral security for debts or obligations already or to be contracted.

It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment, when the association becomes insolvent and goes

into the hands of a receiver. But this is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner; and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the person assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value.

But this rule can have no just application when, as in this case, the creditors were informed by that list that the party to whom certificates were issued was not in fact, and did not assume to be, the owner of the shares represented by them, but was and assumed to be only a pledgee having no general property in the thing pledged, but only a right, upon default, to sell in satisfaction of the pledgor's obligation. Upon inspecting the stock registry or any list of shareholders or of transfers kept by the bank, creditors will know that they cannot regard a pledgee as the actual owner. If the certificates in question had been extended so as to give the name of the pledgor, it would not be supposed that, upon any principle of justice, or upon grounds of public policy, the pledgee could have been held to the liability imposed by section 5151 upon shareholders. But the liability being purely statutory, the result ought not to be different because of the circumstance that the name of the pledgor was omitted from the certificates, since that which did appear in them was sufficient to inform creditors that the State Loan and Trust Company was only a pledgee, and by slight diligence they could have ascertained the name of the pledgor.

It may be suggested that if the pledgee is not held liable as a shareholder, in respect of the shares of stock standing in its name as pledgee, then no one is liable to assessment as the owner of such stock. But it is a mis-

take to suppose that Havermale and Collins ceased to be shareholders for the purposes of the liabilty imposed by section 5151. They remained, notwithstanding the pledge, the actual owners of the stock, a right which they would have promptly asserted if the pledgee had assumed to be the owners and had sold the stock, appropriating to itself all the proceeds of sale. The object of the statute is not to be defeated by the mere forms of transactions between shareholders and their creditors. The courts will look at the relations of parties as they actually are, or as, by reason of their conduct, they must be assumed to be for the protection of creditors. Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts and engagements of the banking association, whose names appear on the stock list distinctly as shareholders. A mistake or error in keeping the official list of shareholders would not prevent creditors from holding liable all who were, in fact, the real owners of the stock, and as such had invested money in the shares of the association. As already indicated, those may be treated as shareholders, within the meaning of section 5151, who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them, as against creditors, from claiming that they were not, in fact, owners.

It was under this construction of the statute that one was held liable as a shareholder who, in the belief that the bank was about to fail, and whose liability as a shareholder had equitably attached, collusively transferred his stock to an irresponsible person, in order to escape responsibility as a shareholder. This was held to be a fraud upon the statute, and the transferrer was held, as between him and the creditors, as the real owner of the stock, and,

therefore, liable, although the transferee appeared on the stock registry as the shareholder. *Bowden* v. *Johnson*, *above cited*. Under the same interpretation a corporation was treated as a shareholder who held shares of stock only as collateral security, but who allowed its name to appear and remain on the stock registry of the insolvent national bank association *as owner*, without anything indicating that it held such stock as collateral security. *National Bank* v. *Case*, *above cited*. So, in another case, it was held that the transferrers "remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt." *Anderson* v. *Philadelphia Warehouse Co.*, *above cited*.

Our conclusion is that the defendant in error cannot be regarded otherwise than as a pledgee of the stock in question, is not a shareholder within the meaning of section 5151 of the Revised Statutes, and is not, therefore, subject to the liability imposed upon the shareholders of national banking associations by that section.

This view of the case makes it unnecessary to consider whether the State Loan and Trust Company, being a pledgee of the stock, was a "trustee" within the meaning of section 5152, providing that "persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders."

The judgment is *Affirmed*.

True copy.

[SEAL.] Test: JAMES H. MCKENNEY,
Clerk Supreme Court U. S.